with conditions implied in law as distinguished from express conditions which are the creatures of the parties and with the consequences of which a court, not being responsible for their existence, is not concerned. In speaking of conditions implied in law Langdell says, "An implied condition, on the other hand is the creature of the court, and the court is therefore responsible for its consequences. This responsibility rests upon the court not only because an implied condition is its creature, but because, being its creature, the court has the power of moulding it as purposes of justice may require."[19] It is to be hoped and indeed expected that law will conform to equitable principles. While it is unjust to consider every breach of performance in time by the seller material, it is still more unjust to inquire into the mere fact of breach, leaving out of consideration the materiality of the breach, as the doctrine of Langdell would require. The latter rule has no semblance of justice and historically considered finds a proper setting in that period of contract law when implied conditions were unheard of.

WHEN IS A FOREIGN CORPORATION "DOING BUSINESS" WITHIN THE STATE?—The Court of Appeals of New York has said that the phrases "doing business" and "transacting business" are to be interpreted as having the same meaning.[1] But that court has as yet been unable to furnish the profession with some convenient test as to the meaning of either.

This question has arisen in several ways and it is proposed to examine the cases with a view to extracting from them, if possible, some principles which shall be of aid to the attorney who seeks to advise his corporation client. The General Corporation Law §§ 46, 47 (formerly Section 1780(4) of the New York Code Civ. Proc.) provides that a non-resident or a foreign corporation may serve with process a foreign corporation "doing business within the state". The Court of Appeals in the leading case of *Tauza* v. *Susquehanna Coal Co.*[2] has posited quite succintly that for purposes of jurisdiction a foreign corporation "is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity."[3] If the business of the corporation within the state be both "systematic and regular", service upon such corporation is permitted.[4] And in reaching this conclusion the court was treading upon safe constitutional ground. The Supreme Court had but recently decided that service of this sort was permissible,[5] and had declared that it was no objection to such service that the business of the corporation within the state was solely of an interstate character.[6] In this respect, of course, the application of taxing statutes differs most radically.[7]

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[19] Langdell, *op. cit.* 210.

[1] See *Hovey* v. *De Long Hook & Eye Co.* (1914) 211 N. Y. 420, 426, 105 N. E. 667.

[2] (1917) 220 N. Y. 259, 115 N. E. 915.

[3] *Ibid.*, p. 267.

[4] It must be noted at the outset that "doing business" has a far different connotation as applied to the Corporation and Tax Laws, to be discussed later. Thus, the court says (p. 267) "Activities insufficient to make out the transaction of business within the meaning of these statutes may yet be sufficient to bring the corporation within the state so as to render it amenable to process . . . The question in those cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of the license, be prevented from being here."

[5] *International Harvester Co.* v. *Kentucky* (1914) 234 U. S. 579, 34 Sup. Ct. 944.

[6] *Ibid.*, p. 588.

[7] *International Text-Book Co.* v. *Pigg* (1910) 217 U. S. 91, 30 Sup. Ct. 481. The evolution of this New York rule is rather interesting. The New York courts originally thought that sufficient jurisdiction was constitutionally obtained over a

Under the Stock Corporation Law (Consol. Laws, c. 59) § 33 it is provided that "every foreign stock corporation having an office for the transaction of business within this state shall keep therein a book to be known as a stock-book". Probably the leading case under this statute of interest in this discussion is that of *Hovey* v. *De Long Hook and Eye Co.*[8] The court in that case argued that the same meaning is to be put upon the phrase "doing business" under this provision as in the taxing statutes, which will be discussed later. And the interesting suggestion is made that a foreign corporation should only be compelled to bear the burdens imposed by these sections, when the acts done are a material part of the business of the corporation and of such a nature as to require state protection.[9]

The General Corporation Law (Consol. Laws, c. 23) § 15 reads, "No foreign stock corporation, other than a moneyed corporation shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business within this state. . . . No foreign stock corporation doing business within this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract, it shall have procured such certificate." The purpose of this enactment has been declared to be to protect domestic corporations, so that they might not be subjected to greater restrictions than corporations coming from other jurisdictions to do business within the state.[10] But since there is the further desire to foster commerce within the state, the courts have not been over-stringent in their interpretation of the statute. It seems that some substantial proportion of the corporation's business must be done within the state.[11] It is,

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foreign corporation by service upon an officer temporarily and incidentally here, even though the corporation was not doing business within the state. *Pope* v. *Terre Haute Car & Mfg. Co.* (1881) 87 N. Y. 137. The Supreme Court of the United States decided that this rule violated the due process clause of the Federal Constitution. *Riverside, etc., Mills* v. *Menefee* (1915) 237 U. S. 189, 35 Sup. Ct. 579, and the Court of Appeals was constrained to follow this ruling upon a constitutional point. *Bagdon* v. *Phil. & Reading C. & I. Co.* (1916) 217 N. Y. 432, 111 N. E. 1075. In *Pomeroy* v. *Hocking Valley Ry.* (1916) 218 N. Y. 530, 113 N. E. 504, however, service upon an officer only incidentally doing business of the corporation was upheld, because the court found the corporation was here for other reasons. And it was declared to be unnecessary in this case for the corporation to be doing the type of work within the state for which it was organized. See (1916) 16 COLUMBIA LAW REV. 422; Henderson, *Position of Foreign Corporations in American Constitutional Law* (1918) 85-7.

[8] *Supra,* footnote 1. The defendant was a Pennsylvania corporation with an office in New York, which was merely operated as a headquarters for the convenience of its traveling salesmen. No books of account were kept in New York, nor record of sales. Furthermore, neither the directors' nor stockholders' meetings were held in this state. The court felt, moreover, that this statute was not intended to cover a case of this sort. The stock book was probably meant, it said, to be kept for the benefit of stockholders and judgment creditors of the corporation, who sought to investigate its solvency. With a corporation of this sort, actually carrying on its business outside the state, there would probably not be in New York a sufficient number of persons of this description to warrant an application of this statute.

[9] p. 427. The mere transaction of business in the state is not sufficient to bring a foreign corporation within the terms of this statute. The corporation must actually maintain "an office for the transaction of business". *Wadsworth* v. *Equitable Trust Co.* (1912) 153 App. Div. 737, 138 N. Y. Supp. 842; *Althause* v. *Guaranty Trust Co.* (1912) 78 Misc. 181, 137 N. Y. Supp. 945.

[10] See *Angldile Computing Scale Co.* v. *Gladstone* (1914) 164 App. Div. 370, 374, 149 N. Y. Supp. 807, 811.

[11] *International Text-Book Co.* v. *Connelly* (1910) 67 Misc. 49, 124 N. Y. Supp. 603. It is to be noted that when this same corporation ceased to do several of the acts which the court had declared to be doing business within the State, it was declared to be outside the purview of this statute. *International Text-Book Co.* v. *Tone* (1917) 220 N. Y. 313, 115 N. E. 914.

however, not essential, for the purposes of this statute, that the foreign corporation maintain an office in the jurisdiction.[12] Probably the nearest approach to a test under this statute has been that suggested by the court in *Penn Collieries Co.* v. *McKeever.*[13] If, this court asserts, it is possible to find "corporate continuity of conduct" within the state, the foreign corporation comes within the prohibition of the statute. But it is not over-difficult to perceive that a test of this sort is little better than none.

Lastly, the Tax Law (Consol. Laws, c. 60) §§ 181, 182 provides that foreign corporations (with certain exceptions) shall pay to the state a license tax "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity within the state" and that "for the purposes of doing business in this state, every foreign corporation . . . shall pay . . . an annual tax [franchise tax] to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state."[13a] The courts in passing upon this provision usually interpret it as co-ordinate to the section of the General Corporation Law which has been just discussed.[14] Taken together they represent the policy of the state as to foreign corporations. It may be of some value to scrutinize the cases under these taxing statutes, if from them some general principles can be deduced. The recent case of *Manila Electric, etc. Co.* v. *Knapp*[15] brings this problem once more to the fore and is of particular interest, because of the fact that the United States Supreme Court, on quite similar facts, seemed to reach a contrary result.[16] In the New York case the relator was a foreign corporation organized in Connecticut to operate railroads in Manila. Stockholders' meetings were held in Connecticut, but directors' meetings were held in New York City. Besides having an office in New York City, through which interest on bonds was paid and dividends on stock declared and paid, it had a trust account in that city of bonds and a bank account made up of receipts of interest and dividends from the Manila roads. Despite these activities it was held that the relator was not doing business within the state within the meaning of §§ 181 and 182 of the Tax Law. After positing quite properly that these statutes required not merely that the foreign corporation be doing business within the state, but that it be "employing capital within the state", the court denied that this corporation was doing either and found for the relator.[17] Let us now attempt, if possible, to discern the considerations, conscious and otherwise, which must have moved the court to its decision.

As a foreword it is to be noted that in cases of this sort counsel for the foreign corporation usually has two arrows to his bow. It is first competent for him to show that the corporation is not doing business within the state within the purview of the statute. And if this fails him he may prove that although business is transacted within the state it is interstate in character and a tax upon it would be an undue burden upon interstate commerce.[18] In reading these cases it is often quite difficult to determine upon which of these two grounds the court is resting

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[12] See *Woodridge Heights Const. Co.* v. *Gippert* (1915) 92 Misc. 204, 155 N. Y. Supp. 363, 364.

[13] (1905) 183 N. Y. 98, 75 N. E. 935.

[13a] This tax has recently been declared to be one on income. *Alpha Portland Cement Co.* v. *Knapp* (1920) 230 N. Y. 48, 129 N. E. 202.

[14] See *Angldile Computing Scale Co.* v. *Gladstone, supra,* footnote 10.

[15] (1920) 229 N. Y. 502, 128 N. E. 892.

[16] *Case of Copper Range Co.* (1918) 246 U. S. 155, 38 Sup. Ct. 295 *et seq.; Case of Champion Co.* (1918) 246 U. S. 155, 38 Sup. Ct. 295 *et seq.*

[17] The court indulged in a rather lengthy discussion of the "doing business within the state" phase of the question and as indicated found for the relator.

[18] See (1920) 20 COLUMBIA LAW REV. 324.

its decision.[19] For the purposes of this discussion, however, we are but casually interested in the interstate phase of the problem.[20] The New York courts seem to require that the business transacted within the state be of the general nature for which the corporation was organized.[21] Thus, we have seen that a corporation which merely uses New York as the center of its financial activity is not within the meaning of the statute. Yet this very type of activity has for another purpose been termed "an indispensable condition to the conduct of business."[22] Similarly, it is generally held that the mere maintenance of salesrooms does not bring the corporation into the state for purposes of taxation.[23] Although the cases seem to apply this suggested test, no court has been found to articulate it expressly.[24] But a glance at the method of apportioning the tax might vindicate the theory advanced. If the company's net profits are derived principally from the sale or use of tangible property, the tax is imposed on such proportion of the whole net income as the fair cash value of the tangible property within the state bears to the fair cash value of all the tangible property of the company. If the net profits of the company are derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the state bear to the total gross receipts of the company. If, then, as in the cases we are discussing, the profits of the corporation outside the state arise from the use of tangible property and within the state the profits arise solely from the use of intangible property, how is the apportionment to be made? The extreme difficulty of doing it has probably induced the court to evade the entire question by incorrectly holding the corporation non-taxable.[25]

Another consideration which must have had some influence with the court is the general policy of the state as to foreign corporations. It is probably fair to state that it is the general purpose of both the Legislature and the courts to foster foreign corporations and not unduly to hinder the transaction of their business within the state. With this in mind the proper interpretation of all the statutes under consideration can be made. Such construction as will tend to discourage the entrance into the state of foreign corporations will not be made. Thus, in interpreting the Code provisions concerning service of summons, the courts can afford to be more stringent and construe slight operations as "doing business within

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[19] Thus, in the two Supreme Court cases cited in footnote 16, *supra*, it seemed to be admitted that the corporations were doing business within the state and the only question was: was such business of an interstate nature. Yet, in the light of the case of *Manila Electric, etc. Co.* v. *Knapp*, the New York Court of Appeals would probably have decided that on those facts the corporations were not even doing business within the state.

[20] Probably the leading cases on the proposition that a corporation engaged in interstate commerce is not taxable and may sue without paying the tax are: *International Text-Book Co.* v. *Tone, supra*, footnote 11, and *Western Union Tel. Co.* v. *Kansas* (1910) 216 U. S. 1, 27, 30 Sup. Ct. 190.

[21] *Cf.* discussion of *Hovey* v. *De Long Hook & Eye Co.* in the note.

[22] *Pomeroy* v. *Hocking Valley Ry., supra*. footnote 7, p. 535.

[23] *Cheney Bros.* v. *Massachusetts* (1918) 246 U. S. 147, 38 Sup. Ct. 295 (also held to be interstate commerce); *People ex rel. A. J. Tower Co.* v. *Wells* (1915) 182 N. Y. 553, 75 N. E. 1132; *cf. Hovey* v. *De Long Hook & Eye Co., supra*, footnote 1.

[24] A series of several Supreme Court cases decided in one batch seems to substantiate this proposition. See *Cheney Bros.* v. *Massachusetts, supra*, footnote 23. The force of these cases is, perhaps, weakened by the fact that stress was laid by these corporations upon the fact that their business was essentially interstate.

[25] On a point of constitutional law, the Court of Appeals has just given us further evidence of its disapproval of efforts to extend the taxation of foreign corporations upon business done in the state purely intangible in its nature. *Alpha Portland Cement Co.* v. *Knapp, supra*, footnote 13a. This case arose under § 209 of the Tax Law which applies similar rules to foreign mercantile and manufacturing corporations as §§ 181 and 182 apply to other types of foreign corporations.

the state", for few corporations would remain outside of the jurisdiction because of this stringency. But were similar interpretation to be given to taxing statutes, it might well operate to effectuate a wholesale exclusion. Few corporations will carry on even their financial business within the state, if by so doing they subject themselves to local taxation. Another angle from which this problem may be approached is that of ordinary justice. It is manifestly equitable to subject a foreign corporation to service of summons more readily than to taxation. Once more no court has definitely enunciated these criteria.

For those who expected a well-defined test wherewith to decide each of these problems, this investigation is probably a disappointment.[26] Yet even the courts have admitted that each case must be decided on its individual merits. They are moved only by general principles of policy and have thus far evolved no convenient yard-stick for the practitioner. There must, however, be some value in the knowledge that an examination of the cases discloses no such criteria.[27]

STATUTES OF LIMITATIONS IN THE CONFLICT OF LAWS.—"Statutes of Limitation relate to the remedy and not to the contract . . . all suits must be brought within the period prescribed by the local law of the country where the suit is brought,—the lex fori."[1] It is believed that the inconsistencies resulting from the application of this frequently heard formula, justify an analysis of its basis. An example of its vitality in our law is the recent case of *Fisher* v. *Burk* (Miss. 1920) 86 So. 300. Suit was on a contract made in Illinois between the plaintiff and the defendant, both residents of that state. The contract was for the exchange of certain Illinois land for Mississippi land, with a stipulation for a reconveyance upon a contingency. The plaintiff sought to charge the Mississippi land with damages for breach of the agreement to reconvey. One defense was the Mississippi statute of limitations, and on this ground judgment was for the defendant.

Now it is interesting to note that, except in cases of so-called personal obligations *ex contractu*, a different principle is evoked. Where land or movables have been possessed adversely, the running of the statute is said to affect the right, and "give a positive title."[2] And in questions of title to movables, a foreign statute of limitations may be set up, and the forum disregards its own.[3]

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[26] In *Manila Electric, etc. Co.* v. *Knapp*, the court reiterated the suggestion in *Hovey* v. *De Long Hook & Eye Co.* that the business done be of a sort which might fairly be termed privileged and "which necessitated or sought governmental opportunity and protection to be compensated or balanced by contributions through taxation to the burden of government". But the unsatisfactory character of this rule is immediately apparent. It leaves it with the courts to do just what they have been doing: to decide each case upon its facts and then fit the facts to the rule or not as seems fitting.

[27] No attempt has been made to investigate the manner in which other states have dealt with this problem. A rather complete collection of the cases is to be found in a pamphlet published (1920) by the Corporation Trust Co. of New York entitled "What Constitutes 'Doing Business'".

[1] *Townsend* v. *Jemison* (1850) 9 How. 407, 413, 415; *Miller et al.* v. *Brenham* (1877) 68 N. Y. 83; see *The British Linen Co.* v. *Drummond* (1830) 10 B. & C. 903; Angell, *Limitations* (6th ed. 1876) c. viii.

[2] Per Lord Mansfield in *Taylor* v. *Horde* (1757) 1 Burr. 60, 119 (land); *Toltec Ranch Co.* v. *Cook* (1903) 191 U. S. 532, 24 Sup. Ct. 166 (land); *Sprecker* v. *Wakeley et al.* (1860) 11 Wis. 432 (land); *Shelby* v. *Guy* (1826) 11 Wheat. 361 (slave); *Fears Adm'r* v. *Sykes* (1858) 35 Miss. 633 (slave); see Minor, *Conflict of Laws* (1901) 523; (1889) 3 Harvard Law Rev. 318-321.

[3] *Shelby* v. *Guy, supra,* footnote 2; *Fears Adm'r.* v. *Sykes, supra,* footnote 2. *A fortiori* this rule would seem applicable to land. The apparent dearth of authority may be due to the general view that actions involving the right to possession of land are not transitory. Hence, in such cases the *lex fori* will usually be the *lex situs.*